

In the Matter of

MB Docket No. 05-311

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SUMMARY

Fairfax County herein responds to the issues raised in the *Further Notice*. The Commission should not extend the findings of the *Order* beyond competitive applicants to incumbent cable service providers. Fairfax County franchise agreements do not have most favored nation clauses but reasonably balance the business, consumer and competitive interests in addressing build-out. And consumers benefit when local franchising authorities and cable operators agree to stronger customer service protections than those adopted by the Commission.

Fairfax County is served by one competitive and two incumbent wireline cable operators. The Fairfax County Board of Supervisors unanimously approved one of the nation's first and largest competitive cable franchises ever granted to a former Bell telephone company in September 2005. Since then, competitive cable service has continued to develop in Fairfax County, the competitive provider has continued to gain marketshare, and recently, one incumbent cable operator reduced its equipment rates. However, between January 2006 and January 2007, all cable operators in the County – both incumbent and competitive operators – have raised their overall monthly cable rates.

Fairfax County disagrees with the Commission's conclusions in the *Order* that the current operation of the local franchising process constitutes an unreasonable barrier to entry and that Commission action to address this problem is either authorized or necessary. While the *Order* establishes time limits for local governments during franchise negotiations, the Commission fails to provide any guidelines to prospective franchise applicants as to what reasonable commitments they should be expected to make to ensure that the negotiation process will be successful. Fairfax County has never awarded an exclusive cable franchise and its reasonable build-out requirements ensure that the benefits of competition will leave no neighborhood behind. For these reasons and others – including the County's belief that the

Commission acted in an arbitrary and capricious manner, exceeded its legal authority, and misinterpreted federal law – on April 9, 2007, the Fairfax County Board of Supervisors authorized the filing of an appeal of the *Order*.

The Commission's reinterpretation of Sections 621(a) and 622(a) are inconsistent with federal law and the legislative history of Title VI of the Communications Act. The Commission lacks authority to extend the findings of the *Order* to cable operators with existing franchise agreements – the Commission does not have legal authority to retroactively void bargained-for provisions of existing agreements on grounds that the Commission *post facto* found such provisions to be unreasonable barriers to competition. And extending the *Order's* findings to incumbents at renewal would contravene federal law because franchise renewals are governed by Section 626, not Section 621(a)(1).

Fairfax County franchise agreements do not have most favored nation clauses. However, Fairfax County worked with its competitive franchise applicant to develop reasonable build-out timelines that satisfied the applicant's business case needs, the state level playing field statute, and the County Code requirement to make cable service available to all households and without line extension charges to at least eighty-five percent of occupied dwellings. The County also draws the Commission's attention to the fact that competitive build-out does not occur in neat concentric patterns with sparsely occupied areas at the outer fringes built last. As traditional telephone companies enter the cable services market, existing wire centers must be upgraded and made capable of providing video service. Competitive entrants may delay or forgo upgrading specific wire centers, creating a "donut-hole" effect, wherein competitive cable and broadband service is not made available to a broad centrally-located area of densely populated homes, while literally across the street an address served by a different wire center has access to competitive services.

Fairfax County consumers have benefited from the County's exercise of its authority under Section 632(d)(2) and Section 632(a)(2) to negotiate customer service and construction-performance protections that are stronger than those enacted by the Commission. The County encourages the Commission to continue to recognize the vital role local franchising authorities play in protecting consumers and to proactively allocate more of its own resources to share in the responsibility for protecting cable service subscribers.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

Implementation of Section 621(a)(1) of the)
Cable Communications Policy Act of 1984)
as amended by the Cable Television)
Consumer Protection and Competition)
Act of 1992)

MB Docket No. 05-311

**COMMENTS OF FAIRFAX COUNTY, VIRGINIA
IN RESPONSE TO FURTHER NOTICE OF PROPOSED RULEMAKING**

I. INTRODUCTION.

Fairfax County, Virginia (“Fairfax County” or the “County”) submits the following comments in response to the Federal Communications Commission’s (“Commission”) Further Notice of Proposed Rulemaking, *In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 05-311 [06-180] (rel. March 5, 2007) (“*Further Notice*” or “*Order*”).

Specifically, the County responds to inquiries raised in the *Further Notice* as to whether the conclusions reached by the Commission in the *Order* should be extended beyond competitive applicants to incumbent cable service providers, what impact the Commission’s findings in the *Order* will have on most favored nation clauses, and whether the Commission was correct in determining that the explicit language of Section 632(d)(2) of the Communications Act precludes the Commission from prohibiting local franchising authorities and cable operators from agreeing

to customer service requirements that exceed those established by the Commission fifteen years ago.¹

Fairfax County is served by three wireline cable operators. Incumbent cable operators Cox Communications of Northern Virginia, Inc., (“Cox VA”) and Comcast of Virginia, Inc., (“Comcast VA”) serve non-overlapping areas of the County, while competitive operator Verizon Virginia Inc., (“Verizon VA”) will serve the entire County. The Cox VA franchise will expire in 2013 and the Comcast VA and Verizon VA franchises will both expire in 2020. Each franchise agreement requires the cable operator to set aside up to eighteen channels for public, educational, and governmental access use, and eleven of these channels are currently being used to transmit 20,292 hours of locally-originated programming, 3,612 hours of programming in Arabic, Eritrean, Ethiopian, Farsi, Korean, Russian, Spanish, and/or Vietnamese, and 11,712 hours of closed-captioned programming to the County’s diverse population each year. The Fairfax County Board of Supervisors (the “Board”) unanimously approved one of the nation’s first and largest competitive cable franchises ever granted to a former Bell telephone company in September 2005. Since then, competitive cable service has continued to develop in Fairfax County, the competitive provider has continued to gain marketshare, and recently, one incumbent cable operator reduced its equipment rates. However, between January 2006 and January 2007, all cable operators in the County – both incumbent and competitive operators – have raised their overall monthly cable rates.²

¹ 47 U.S.C. § 552(d)(2); 47 C.F.R. §§ 76.309 and 76.1603.

² Comparing the published combined rate for basic and extended basic service with a set-top box in Fairfax County between January 2006 and January 2007, Cox VA raised its rates 5.47%, Comcast VA raised its rates 3.99% and Verizon VA raised its rates 9.29%. Reply Comments of Fairfax County, *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, MB Docket No. 06-189 (filed Jan. 16, 2006), at 21-24, incorporated herein by reference, available at <http://www.fairfaxcounty.gov/cable/>

Fairfax County disagrees with the Commission's conclusions in the *Order* that the current operation of the local franchising process constitutes an unreasonable barrier to entry and that Commission action to address this problem is either authorized or necessary.³ As previously discussed in the County's comments submitted on February 13, 2006 in the Notice of Proposed Rulemaking portion of this proceeding, the Board and Fairfax County staff diligently worked with competitive provider Verizon VA⁴ to negotiate and award one of the nation's first and largest competitive cable franchise agreements.⁵ In its previous comments, the County emphasized that because of the willingness of both parties to meaningfully engage in negotiations, Fairfax County staff and Verizon VA were able to complete negotiation of a comprehensive draft with all major terms and conditions in approximately seven weeks, and in just under three months, completed negotiation of a draft franchise agreement for the Board's consideration.⁶ In the *Order*, however, the Commission appears to assign all blame for delays in negotiating to local franchising authorities without recognizing the co-equal responsibilities of competitive providers. While the *Order* establishes time limits on local governments in

fcc_filings/fcc_filings.htm. The *Order* relies on January 1, 2004 data contained in the Commission's 2005 *Cable Price Report* as support for the claim that "average monthly cable rates were 20.6 percent lower" where wireline competition was present. *Order* at ¶ 36 and footnote 131. The County urges the Commission complete and release its analysis of current data to evaluate the impact on cable prices where wireline cable service competition from incumbent local exchange carriers is now present.

³ *Order* at ¶ 1.

⁴ Fairfax County NPRM Comments, *In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311 (Feb. 13, 2005) ("Fairfax County NPRM Comments").

⁵ "Cable Franchise Agreement By and Between Fairfax County, Virginia and Verizon Virginia Inc. (2005)" ("Verizon VA Franchise Agreement"), available at http://www.fairfaxcounty.gov/cable/regulation/franchise/verizon/verizon_franchise_2005.pdf.

⁶ *Fairfax County NPRM Comments* at 5-6.

franchise negotiations, the Commission fails to provide any guidelines to prospective franchise applicants as to what reasonable commitments they should be expected to make to ensure that the negotiation process will be successful.

In addition, the Commission's presumptions that "incumbent cable operators were frequently awarded community-wide monopolies" and that build-out requirements were imposed in exchange for the "benefit of being able to operate without competition" are erroneous.⁷

Fairfax County has never awarded an exclusive cable franchise. The first cable franchise awarded by Fairfax County in 1982 was non-exclusive, as were all subsequent franchises and renewals approved by the Board in 1988, 1998, and 2005.⁸ Federal law has explicitly prohibited the award of a monopoly franchise since 1992.⁹ Notably, in 2005, both incumbent cable operators Cox VA and Comcast VA testified in a public hearing in favor of the award of a franchise to Verizon VA, stating that they welcomed the competition the Verizon VA franchise would bring to Fairfax County.¹⁰ And the Commission itself ruled that effective competition

⁷ Order at ¶ 87 (emphasis added).

⁸ "Cable Television Franchise Agreement Between Fairfax County, Virginia and Media General Cable of Fairfax County, Inc., September 30, 1982," *available upon request*. "Franchise Agreement Dated May 16, 1988, Between the Board of Supervisors of Fairfax County, Virginia, and Warner Cable Communications of Reston, Inc.," *available upon request*. "A Cable Franchise Agreement By and Between Fairfax County, Virginia and Media General Cable of Fairfax County, Inc." (1998), transferred to Cox Communications of Northern Virginia, Inc. on September 23, 2002; "A Cable Franchise Agreement By and Between Fairfax County, Virginia and Comcast of Virginia, Inc." (2005); Verizon VA Franchise Agreement. All current Fairfax County cable franchise agreements are available at http://www.fairfaxcounty.gov/cable/regulation/cable_franchises.htm.

⁹ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 12, 106 Stat. 1460 (1992), codified at 47 U.S.C. § 541(a)(1).

¹⁰ *Fairfax County NPRM Comments* at 6.

existed in Fairfax County before the provision of cable service by Verizon VA in Fairfax County.¹¹

Moreover, Fairfax County disagrees with the Commission's conclusion in the *Order* that build-out requirements "adversely affect consumer welfare."¹² To the contrary, the build-out provisions of the Fairfax County Code ensure that cable service, and by default, broadband service, will be made available to all households and businesses and to at least eighty-five percent of all occupied dwellings without line extension charges.¹³ Whereas the Commission cited theoretical conclusions that "build-out requirements imposed on competitive cable entrants only benefit an incumbent cable operator," the County's experience is that build-out requirements negotiated with competitive cable entrants benefit consumers by actually bringing competition to their neighborhoods. Reasonable competitive build-out requirements ensure that the benefits of competition leave no neighborhood behind.¹⁴

For these reasons and others – including the County's belief that the Commission acted in an arbitrary and capricious manner, exceeded its legal authority, and misinterpreted federal law – on April 9, 2007, the Board authorized the filing of an appeal of the *Order*.

Nevertheless, as the appeals process regarding the *Order* is just getting underway, but whereas the Commission has announced its intent to issue a second order to address issues raised in the *Further Notice* within six months, Fairfax County herein responds to the issues raised in

¹¹ *In re CoxCom, Inc., d/b/a Cox Communications Northern Virginia Petition for Determination of Effective Competition in Fairfax County, Virginia*, Memorandum Opinion and Order, CSR 6957-E [DA 07-944] (rel. March 5, 2007).

¹² *Order* at ¶ 36.

¹³ Fairfax County Code Section 9.1-7-2(a).

¹⁴ The build-out requirements contained in the Fairfax County Code and franchise agreements are consistent with the type of build-out requirements deemed to be reasonable by the Commission. See e.g., *Fairfax County NPRM Comments* at 8 and *Order* at ¶¶ 88-89.

the *Further Notice*. The Commission should not extend the findings of the *Order* beyond competitive applicants to incumbent cable service providers; Fairfax County franchise agreements do not have most favored nation clauses but reasonably balance the business, consumer and competitive interests in addressing build-out; and consumers benefit when local franchising authorities and cable operators agree to stronger customer service protections than those adopted by the Commission.

II. THE COMMISSION'S ERRONEOUS REINTERPRETATION OF SECTIONS 621(a) AND 622(a) SHOULD NOT BE EXTENDED TO INCUMBENTS IN EXISTING FRANCHISES OR AT RENEWAL.

As an initial matter, the Commission lacks authority to extend the findings of the *Order* beyond competitive cable applicants to reach incumbent cable operators with existing franchise agreements. The express purpose of the *Order* was to “adopt rules and provide guidance to implement Section 621(a)(1) ... which prohibits franchising authorities from [awarding exclusive franchises or] unreasonably refusing to award competitive franchises for the provision of cable services.”¹⁵ The Commission’s authority to implement Section 621(a)(1) ends with the award of a franchise. By definition, if a local franchising authority has granted a non-exclusive or competitive franchise, it has not unreasonably refused to award such a franchise; thus, no further interpretation or guidance from the Commission to implement Section 621(a)(1) is required.

Moreover, the Commission’s reinterpretation of Sections 621(a) and 622(a) are inconsistent with federal law and the legislative history of Title VI of the Communications Act. The Commission lacks authority to extend the findings of the *Order* to cable operators with existing franchise agreements – the Commission does not have legal authority to retroactively

void bargained-for provisions of existing agreements on grounds that the Commission *post facto* found such provisions to be unreasonable barriers to competition. And extending the *Order's* findings to incumbents at renewal would contravene federal law because franchise renewals are governed by Section 626,¹⁶ not Section 621(a)(1) of the Communications Act.

111. FAIRFAX COUNTY FRANCHISE AGREEMENTS DO NOT HAVE MOST FAVORED NATION CLAUSES BUT REASONABLY BALANCE THE BUSINESS, CONSUMER AND COMPETITIVE INTERESTS IN ADDRESSING BUILD-OUT.

The Commission seeks comment on what effect, if any, the findings in the *Order* have on most favored nation clauses that may be included in existing franchises.¹⁷ Fairfax County franchise agreements do not have most favored nation clauses.

However, at the time that the County and Verizon VA were negotiating Verizon VA's build-out requirements, Virginia did have a level playing field statute in effect.” The County and Verizon VA made the assumption that as the County's first competitive cable service provider, Verizon VA could theoretically capture a fifty percent market share over time, and thus would have significantly less cash flow to support capital construction of its plant. Verizon VA was therefore granted seven years – more time than the incumbent cable service provider had been given in its original franchise – to complete its build-out. But by the end of that seven

¹⁵ *Order* at ¶ 1, citing 47 U.S.C. § 541(a)(1).

¹⁶ 47 U.S.C. § 546.

¹⁷ *Order* at ¶ 140.

¹⁸ In 2006, Virginia repealed Va. Code Ann. § 15.2-2108(C), which had barred localities from granting a competitive franchise “on terms or conditions more favorable or less burdensome than those in any existing ... franchise...” and replaced it with Va. Code Ann. § 15.2-2108.20(B) (2006), which provides that a locality cannot regulate cable operators through the adoption of ordinances or regulations that are more onerous than ordinances or regulations adopted for existing cable operators or that unreasonably prejudice or disadvantage any cable operator, whether existing or new.

years, Verizon VA agreed that it would make cable service – and by extension competitive broadband service – available to all households and businesses in the County, construct its plant to serve all areas where the density is at least thirty homes-per-mile of Verizon VA plant, and make cable service available without line extension charges to at least eighty-five percent of occupied dwellings.

The County also draws the Commission's attention to the fact that competitive build-out does not occur in neat concentric patterns with sparsely occupied areas at the outer fringes built last. As traditional telephone companies enter the cable services market, existing wire centers must be upgraded and made capable of providing video service. For incumbent local exchange carriers ("ILECs") to provide video service, they must either utilize existing copper plant or build out fiber to the premises, and upgrade their existing central offices or wire centers to make the wire center capable of delivering video service over copper or fiber plant. If the ILEC decides to delay or forgo upgrading a specific wire center, *e.g.*, because another wire center has the potential to reach more households, it can create a "donut-hole" effect, wherein competitive service is not made available to a broad centrally-located area of densely populated homes, while literally across the street an address served by a different wire center has access to competitive services. The County further draws the Commission's attention to the fact that the County permitted Verizon VA and other cable operators to self-select their initial build out areas, *i.e.*, the areas in which build-out would be completed within the first three years of the franchise. Thus the not-served "donut-hole" area may remain without competitive cable and broadband service until the end of the build-out term. Failure to require that competition eventually reach all neighborhoods will worsen and potentially multiply the "donut-hole" problem.

IV. LOCAL CUSTOMER SERVICE STANDARDS BENEFIT CONSUMERS.

Fairfax County concurs with the Commission's conclusion that given the explicit statutory language of Section 632(d)(2), the Commission has no authority to "preempt state or local customer service laws that exceed the Commission's standards, nor ... prevent [local franchising authorities] and cable operators from agreeing to more stringent standards."¹⁹ Fairfax County has used its authority under Section 632(d)(2) and 632(a)(2) to negotiate customer service and construction-safety protections that are stronger than those enacted by the Commission. For example, the federal regulations provide no recourse for a cable subscriber who has paid for service that he or she has not received, but the stronger local regulations adopted by ordinance and accepted within Fairfax County franchise agreements provide a means for subscribers to receive *pro rata* credits from the cable operator.²⁰ Moreover, the County has negotiated in franchise agreements the authority to impose liquidated damages for failure to comply with federal customer service standards.²¹ In many cases, when given notice to cure, cable operators have resolved billing disputes, service and equipment problems, and repaired damage caused by construction and installation work without the County having to actually impose liquidated damages.

¹⁹ Order at ¶ 43. 47 U.S.C. § 552(d)(2) CUSTOMER SERVICE REQUIREMENT AGREEMENTS— Nothing in this section shall be construed to preclude a franchising authority and a cable operator from agreeing to customer service requirements that exceed the standards established by the Commission under subsection (b) of this section. Nothing in this subchapter shall be construed to prevent the establishment or enforcement of any municipal law or regulation, or any State law, concerning customer service that imposes customer service requirements that exceed the standards set by the Commission under this section, or that addresses matters not addressed by the standards set by the Commission under this section.

²⁰ County Code Sec. 9.1-7-6(g); Cox VA Franchise Agreement Sec. 2(i)(1); Comcast VA Franchise Agreement Sec. 6(j)(7); Verizon VA Franchise Agreement, App. 11-1.

²¹ Cox VA Franchise Agreement Sec. 11(e); Comcast VA Franchise Agreement Sec. 11(e); Verizon VA Franchise Agreement Sec. 13.9. See also County Code Sec. 9.1-9-9 and 9.1-7-6.

In addition, the federal consumer protection regulations enacted by the Commission generally do not address construction issues. However, the County has used its authority under Section 632(a)(2) to enforce and establish construction-related performance requirements through local ordinances, franchise agreements, and negotiated side agreements to ensure that cable operators stop working if utility locate markings have not been placed, properly ground wires and equipment, repair deep sink holes in the public rights-of-way, and fix torn-up sidewalks.

In Fairfax County, our experience has been that when large scale system upgrades or new system construction work began, there was an increase in the number of consumer complaints filed regarding improper restoration work and property damage, as well as an increase in the number of inspection violations for failure to comply with construction and safety codes. Some increases in complaints and violations could be related to the sheer increase in the volume of construction and installation activity, but an increased urgency to make service available (and thus begin to generate subscriber revenues) can also result in some constructions crews attempting to cut corners on safety. Alternatively, when a large volume of construction work occurs, a significant portion of the work will be farmed out to subcontractors and construction companies can be hard pressed to find enough properly-trained crews.

Fairfax County encourages the Commission to continue to recognize the vital role local franchising authorities play in protecting consumers and to proactively allocate more of its own resources to share in the responsibility for protecting cable service subscribers. The Commission has not significantly updated the federal customer service regulations since they were first enacted in 1992. The Commission's on-line general complaint form, FCC Form 475, is designed to take telephone service complaints but not cable service complaints. Between July 2005 and June 2006, the Commission reported no construction-related cable complaints. In the same

period of time, Fairfax County alone issued almost one thousand notices to providers to repair construction-related code violations (and followed-up with providers to ensure that 100% of these violations were corrected), responded to over one hundred construction-related consumer complaints, physically inspected nearly one hundred and sixty homeowner complaints, and assisted consumers in resolving several hundred cable-related service and billing complaints.

V. CONCLUSION.

Local franchising has had a positive impact for consumers in Fairfax County. The Commission should not extend the findings of the *Order* beyond competitive applicants to incumbent cable service providers and should consider the potentially adverse consequences of the build-out provisions of the *Order*. Finally, consumers benefit by preserving the ability of local franchising authorities and cable operators to agree to stronger customer service standards than those adopted by the Commission.

Respectfully submitted,

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